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No. 1:20-cv-00016-SKO (HC)

**FINDINGS AND RECOMMENDATION
TO DISMISS PETITION FOR WRIT OF
HABEAS CORPUS**

[TWENTY-ONE DAY DEADLINE]

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On January 6, 2020, Petitioner filed the instant petition. He is in the custody of the Bureau of Prisons (“BOP”) at the Taft Correctional Institution located in Taft, California. Petitioner challenges the computation of his federal sentence by the BOP. He claims the BOP wrongfully found him ineligible to receive extra time credits under the First Step Act. The petition is unexhausted. Therefore, the Court will recommend the petition be DISMISSED without prejudice.

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Before filing a petition for writ of habeas corpus, a federal prisoner challenging any

1 circumstance of imprisonment must first exhaust all administrative remedies. Martinez v.
2 Roberts, 804 F.2d 570, 571 (9th Cir. 1986); Chua Han Mow v. United States, 730 F.2d 1308,
3 1313 (9th Cir. 1984); Ruviwat v. Smith, 701 F.2d 844, 845 (9th Cir. 1983). The requirement that
4 federal prisoners exhaust administrative remedies before filing a habeas corpus petition was
5 judicially created; it is not a statutory requirement. Brown v. Rison, 895 F.2d 533, 535 (9th Cir.
6 1990). Thus, “because exhaustion is not required by statute, it is not jurisdictional.” Id. If
7 Petitioner has not properly exhausted his claims, the district court, in its discretion, may either
8 “excuse the faulty exhaustion and reach the merits or require the petitioner to exhaust his
9 administrative remedies before proceeding in court.”

10 The first step in seeking administrative remedies is a request for informal resolution. 28
11 C.F.R. § 542.13. When informal resolution procedures fail to achieve sufficient results, the BOP
12 makes available to inmates a formal three-level administrative remedy process: (1) a Request for
13 Administrative Remedy (“BP-9”) filed at the institution where the inmate is incarcerated; (2) a
14 Regional Administrative Remedy Appeal (“BP-10”) filed at the Regional Office for the
15 geographic region in which the inmate’s institution is located; and (3) a Central Office
16 Administrative Remedy Appeal (“BP-11”) filed with the Office of General Counsel. 28 C.F.R. §
17 542.10 et seq.

18 According to the petition and attached exhibits, Petitioner submitted a BP-9 “Request for
19 Administrative Remedy” on December 11, 2019. (Doc. 1 at 11.) Petitioner indicates the Warden
20 denied the request on December 17, 2019. (Doc. 1 at 4.) It appears Petitioner has not sought
21 further relief by filing a BP-10 “Regional Administrative Remedy Appeal or a BP-11 “Central
22 Office Administrative Remedy Appeal.” Therefore, the claims have not been administratively
23 exhausted.

24 Petitioner claims exhaustion should be waived for futility because he is challenging an
25 established BOP policy. This is pure speculation. It is an open question whether administrative
26 appeals at higher levels will result in the same determination. In addition, time is not a factor
27 since Petitioner’s projected release date is August 22, 2022. By Petitioner’s calculations, even
28 crediting his sentence with the additional time credits will result in a projected release date of

1 June, 2021. (Doc. 1 at 3.)

2 Although the exhaustion requirement is subject to waiver in § 2241 cases “it is not lightly
3 to be disregarded.” Murillo v. Mathews, 588 F.2d 759, 762, n.8 (9th Cir. 1978) (citation omitted).
4 A “key consideration” in exercising such discretion is whether “relaxation of the requirement
5 would encourage the deliberate bypass of the administrative scheme[.]” Laing v. Ashcroft, 370
6 F.3d 994, 1000 (9th Cir. 2004) (internal quotation marks omitted). In this case, it is clear that
7 Petitioner has deliberately bypassed the administrative review process. Such action should not be
8 condoned. The Court finds the petition should be dismissed for lack of exhaustion.

9 RECOMMENDATION

10 Accordingly, the Court RECOMMENDS that the petition for writ of habeas corpus be
11 DISMISSED without prejudice for failure to exhaust administrative remedies.

12 This Findings and Recommendation is submitted to the United States District Court Judge
13 assigned to this case, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304
14 of the Local Rules of Practice for the United States District Court, Eastern District of California.
15 Within twenty-one (21) days after being served with a copy, Petitioner may file written objections
16 with the Court. Such a document should be captioned “Objections to Magistrate Judge’s Findings
17 and Recommendation.” The Court will then review the Magistrate Judge’s ruling pursuant to 28
18 U.S.C. § 636 (b)(1)(C). Petitioner is advised that failure to file objections within the specified
19 time may waive the right to appeal the Order of the District Court. Martinez v. Ylst, 951 F.2d
20 1153 (9th Cir. 1991).

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22 IT IS SO ORDERED.

23 Dated: January 9, 2020

24 /s/ Sheila K. Oberto
25 UNITED STATES MAGISTRATE JUDGE
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